85-1692

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

HAROLD LOVELACE,
Petitioner,

against

AMETEK, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the New York Supreme Court
Appellate Division-Third Department

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Appellate and Trial Courts of the State of New York correctly determine that there did not exist material and genuine issues of fact presented which entitled the petitioner to a trial by jury on the two causes of action pleaded in his Complaint, within the federal constitutional guarantee of a right to trial by jury as embodied in the VII Amendment to the United States Constitution?

2. Did the respondent, Ametek, Inc., establish as a matter of law that it was entitled to summary judgment and that there existed no genuine issue as to any material fact entitling the petitioner, Harold Lovelace, to a trial by jury?

3. Did the petitioner present sufficient proof in opposing the Motion for summary judgment, so as to dispute or contradict

the evidence of the respondent, Ametek, Inc., on material factual issues, thereby warranting a trial by jury?

4. In ruling upon the Motion for summary judgment both at the trial and appellate levels, did the New York State Courts delve into and improperly consider issues of credibility, the weight to be afforded to expert testimony, invade the fact-finding function of a jury based upon a showing of conflicting inferences which could reasonably be drawn from the facts presented, and otherwise deny to the petitioner his right to a trial by jury as guaranteed by the VII Amendment to the United States Constitution?

5. Upon the disputed factual issues presented, should it have been the jury who assessed credibility of witnesses after having observed their demeanor, the basis for their opinion and the weight to

be given to various testimony after hearing the same as a result of direct and cross examination?

6. Did there exist conflicting versions of the facts presented by Affidavit and other supporting material so as to warrant a trial by jury?

7. Was the proof presented by the respondent, Ametek, Inc., through its own employee, sufficient in terms of both his qualifications and any interest which he may have had as the result of said employment status?

8. Would it have been best to have both the legal and factual issues in dispute determined after a full trial where the proof could have been fully developed, the issues clearly focused and the facts definitely found?

9. Were the Affidavits presented by the respondent, Ametek, Inc., on the Motion

for summary judgment sufficient in terms of having been made on personal knowledge?

10. Was there presented on the Motion for summary judgment a credibility contest between expert witnesses which mandated or required the necessity of a jury trial?

11. Should the Orders made in the courts below be vacated and this case remanded for trial by reason of the federal constitutional right of trial by jury as guaranteed to the petitioner by the VII Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is sought to be reviewed are Harold Lovelace, as petitioner, and Ametek, Inc., as respondent. Additionally, Industrial Knitted Fabrics & Finishing Corp., as the employer of the petitioner was impleaded into this pro-

ceeding in the court below, but by virtue of the dismissal of the petitioner's Complaint, it withdrew from perfecting an appeal in the court below, subject to its continued defense as a third-party defendant if the petitioner was successful on his appeal. There have been no parties either added to or deleted from this proceeding from the date of its commencement, other than as is set forth above.

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CITATIONS TO THE OPINIONS BELOW

The opinion of the Supreme Court of Montgomery County is not reported in the New York State Reporter Service. The opinion of the New York Supreme Court, Appellate Division, Third Department is reported in the New York Reporter Service at 111 AD2d 953. The opinion of the New York Court of Appeals denying the petitioner's application for leave to appeal is presently not reported in the New York Reporter Service, but will eventually be included therein when reached in its regular order for publication. All of the court Decisions and Orders made by the New York State Courts are included in the Appendix to this Petition for a Writ of Certiorari.

JURISDICTION

This Petition for a Writ of Certiorari seeks to have permission granted to appeal to this court from the final Order entered in the New York Supreme Court, Appellate Division, Third Department which affirmed the Order of the Supreme Court of Montgomery County, granting the Motion of the respondent, Ametek, Inc. to dismiss the petitioner's Complaint on Motion for summary judgment. The Decisions of both the Trial and Appellate Courts of the State of New York granting and thereafter affirming the Orders dismissing the petitioner's Complaint were premised upon the legal determination that there were no material and genuine issues of fact in dispute which warranted a trial by jury. The petitioner respectfully disagrees with said legal determinations made adverse to him and seeks to have

this court determine the propriety and correctness thereof within his federal constitutional right to a trial by jury. The jursidiction upon which this Petition is filed is made pursuant to 28 USC 1257(3), 28 USC 2101(c) & 2104 and Rules 17, 19, 20, 21 and 23 of this court. Based upon all of the Affidavits and other documents submitted both in support of and in opposition to the Motion for summary judgment, the petitioner contends that there did exist material and genuine questions of fact to be determined after trial by jury. The protections afforded to the petitioner by virtue of the VII Amendment to the United States Constitution are sought to be enforced in this court.

This Petition is being timely filed with this court in the 90 days have not elapsed since there was entered in the New York Court of Appeals a denial of the

Motion of the petitioner seeking leave to appeal from the Order and underlying Decision of the New York Supreme Court, Appellate Division, Third Department which affirmed the Order and underlying Decision of the Trial Court granting the Motion for summary judgment and dismissing the petitioner's Complaint. The denial of the Motion for leave to appeal to the New York Court of Appeals was dated and entered on January 14, 1986. The issues surrounding the right of the petitioner to a trial by jury on disputed questions of fact were presented to the courts below and ultimately rejected.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The VII Amendment to the United States Constitution guarantees to a citizen the following:

"In Suits at common law, where the value and controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

STATEMENT OF THE CASE

On May 2, 1980, the petitioner, Harold Lovelace, was employed at Industrial Knitted Fabrics & Finishing Corp., (hereafter referred to as "Industrial"), as a laborer in its Finishing Department. The petitioner began this employment only a few weeks earlier, and was assigned the duties of operating a Tolhurst centrifuge extractor. This employment was completed during the second shift of Industrial between the hours of 3 and 11 p.m. The Tolhurst centrifuge extractor was a large

piece of commercial equipment which would spin dry various types of cloth after it had been delivered from the dye room of Industrial, with the petitioner being required to load the machine, engage it into operation, and then disengage its operation and unload it after the cloth had spun dry.

The Tolhurst centrifuge extractor was a commercial piece of equipment which was previously manufactured and placed in the stream of commerce by the Tolhurst Machine Works of Troy, New York. During November-December, 1931, the company known as the Tolhurst Machine Works was purchased by American Machine & Metals, Inc., by virtue of a written agreement made a part of certain legal proceedings in the United States District Court for the Northern District of New York. As part of that agreement, the successor corporation

agreed to and did in fact assume any and all liability of the Tolhurst Machine Works. Approximately 35 years later, American Machine & Metals, Inc. changed its corporate name to Ametek, Inc.

While the petitioner was using the Tolhurst centrifuge extractor on May 2, 1980, a piece of cloth partially exited the extractor and began flapping against the exterior frame of the unit as the drum was spinning at a high speed. Upon observing this, the petitioner reached toward the control unit to disengage the power, and while in this position, the wet piece of cloth hit his right arm, wrapped around it and dragged him into the spinning drum. As a result of the centrifugal force being produced from the operating extractor, the petitioner's right arm was forcefully drawn in an unnatural position toward the center shaft

of the drum of the extractor, causing five separate fractures which were compound in nature, and severed the petitioner's ulnar nerve as the bone lacerated the surrounding soft tissue.

The Tolhurst centrifuge extractor was brought to a stop by other employees of Industrial, and through the assistance of the local police department and the Greater Amsterdam Volunteer Ambulace Corps, the petitioner's body was cut free from its entwined position inside of the extractor's drum. The petitioner was immediately transported by ambulance to a local hospital, and thereafter underwent three separate operations for the injuries sustained. As a result of said injuries, a significant amount of permanency to the petitioner's right arm occurred, both as to a loss of feeling, use and strength, and as a result of disfigurement in the nature of scarring,

which occurred when the fractured bones protruded through soft tissue, and on those occasions when internal fixation for his right arm had to be implanted and later removed.

The petitioner brought this action against the respondent, Ametek, Inc., seeking compensatory damages for the injuries he sustained on causes of action alleging strict products liability and negligence. In the strict products liability cause of action, both a defective design and a defective manufacturing process were alleged. In the negligence cause of action, the petitioner premised the liability of the respondent, Ametek, Inc. upon a latent defect, failure to warn, failure to test and retest its marketed products, the failure to have an interlock system which would not fail of its own volition, failure to inspect, the

failure to construct certain parts of the extractor with commercially durable material, etc. The respondent alleged in its Answer and Amended Answer to the petitioner's Complaint general denials to the essential allegations contained therein, raised affirmative defenses of contributory negligence and the negligence of a third party, that the injuries sustained were not proximately caused by itself, and that the Complaint of the petitioner failed to state or allege a cause or causes of action against itself.

After discovery had been completed, the respondent, Ametek, Inc., commenced a third-party action against Industrial as a third-party defendant, for indemnification or contribution. The third-party defendant then completed its discovery and the action was placed on the trial calendar. Approximately five months later, the

respondent, Ametek, Inc. and the third-party defendant, Industrial, made a Motion for summary judgment, alleging that the Tolhurst centrifuge extractor had various safety features on it altered or deliberately defeated, and by virtue thereof, the petitioner's causes of action were required to be dismissed. In support of the Motion, the respondent's own employee offered his "expert" opinion as to the reason why the accident happened. Before the commencement of the lawsuit, the petitioner had retained the services of his own expert witness to evaluate the centrifuge, operate it and render an opinion as to why the accident occurred. Both in support of and in opposition to the Motion, the Affidavits of these two individuals had substantial contradictions which each refuted and challenged the opinions being rendered. The petitioner

additionally challenged the ability of the respondent's Ametek, Inc., employee to make the opinion, questioned how the opinion was made when the extractor was never test operated and raised issues of interest in terms of that individual's actual and ongoing employment with the respondent. With this proof before it in Affidavit and depositional form, the New York State Courts below found no questions of fact in existence and then granted and affirmed the Motion dismissing the Complaint of the petitioner. From the affirmance of said dismissal of the petitioner's Complaint, the filing of this Petition for Writ of Certiorari in this court has ensued.

ARGUMENT

POINT #1

WAS THE FEDERAL CONSTITUTIONAL RIGHT OF THE PETITIONER TO A TRIAL BY JURY AS GUARANTEED BY THE VII AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED BY THE TRIAL AND APPELLATE COURTS OF THE STATE OF NEW YORK WHEN A DISMISSAL OF THE PETITIONER'S COMPLAINT WAS MADE ON THE MOTION FOR SUMMARY JUDGMENT

The VII Amendment guarantees to citizens of the United States that no fact tried by a jury shall be re-examined by any court of the United States except according to the rules of common law. In this proceeding, the petitioner seeks a determination by this court of the propriety and correctness of the Orders and underlying Decisions of the New York State Courts which denied him the right to present and thereafter submit this litigation to a jury of his peers. If a case presents material and genuine issues

of fact to be determined by a jury, it is improper to attempt to resolve said questions of fact on a Motion for summary judgment. It is the duty of a jury to resolve conflicts in the evidence, determine credibility, weigh both lay and expert testimony, determine issues of bias or interest, and to perform this function through the truth-seeking procedures of a trial. Where there is shown genuine issues of fact to try, it is not the purpose of summary judgment to deprive a party of their right to a full hearing on the merits, or, where appropriate, to a jury trial.

A party who moves for summary judgment has a heavy burden of pursuasion, because where there exists disputed material factual issues, it would not be appropriate to withdraw a consideration of those issues from jury determination.

Summary judgment should not be granted where there is any doubt, or even the slightest doubt as to whether there is a fact issue. If there is shown differing versions of the parties' positions, a Motion for summary judgment should be denied. Any material submitted on such a Motion should be viewed in a light most favorable to the party opposing the Motion, and that party should be given the benefit of all inferences reasonably deducible from the evidence. In other words, doubts as to the existence of a triable issue of fact are to be resolved against the moving party.

The fundamental maxim on a Motion for summary judgment is that the court cannot try issues of fact, but can only determine whether there are issues to be tried. The court to which such a Motion is presented should not attempt to assess the credibility

of evidence presented on the Motion, attempt to resolve conflicts presented or otherwise seek to resolve material facts which are in dispute.

Where conflicting inferences may reasonably be drawn from the facts presented, a decision on that inference calls for a determination by the trier of the facts after a full record has been developed following an evidentiary hearing. A determination of what constitutes a genuine issue of material fact depends on each case submitted on an ad hoc basis and the Motion should be denied if an issue which must be resolved is dependent upon a different issue which itself raises a dispute as to a material fact. It is the function of a jury to consider questions of fact in dispute, which will take into account questions of conflicting inferences from all matters presented. If reasonable

inferences can be drawn from the facts in dispute, the Motion for summary judgment should properly be denied and submitted to the jury for a resolution.

Where there exists a factual issue dependent upon the credibility of witnesses, the jury should be given the opportunity to observe the demeanor of the witnesses as the result of direct and cross examination. It is not the function of the court on a Motion for summary judgment to make credibility determinations. Rather, such issues should be resolved by observation of the demeanor of the witnesses by the trier of the facts.

Where there exists conflicting versions of the facts presented by Affidavit and other supporting material, or where a witness has an interest in the case which requires the trier of the facts to weigh credibility, (such as here where "expert"

testimony was sought to be presented by the respondent's own employee), summary judgment should be denied. In cases presenting complex issues of law or fact, or important or unsettled questions of law, it is best to have those issues determined after a full trial. In following this procedure, the proof can be fully developed by all parties, the issues clearly focused and the facts definitely found.

Another consideration which must be made on a Motion for summary judgment is the competence of the individual presenting the Affidavit to submit either a lay or expert opinion. In this proceeding, the testimony of John Roth, (the respondent's own employee and sole individual presenting "expert" testimony), was seriously challenged on the Motion. In the pre-trial deposition of Mr. Roth, he testified as to

his unfamiliarity with the product and the defect alleged, testified that he never placed it into operation, presented some evidence that he was speaking about one of two different extractors, and later sought to cure these deficiencies in his Affidavits submitted on the Motion. In opposition to his "expert" testimony, the expert witness of the petitioner established his qualifications, presented evidence that he did place the correct extractor into operation, rendered an opinion as to why the accident of May 2, 1980 happened, and otherwise refuted the very basis upon which the "expert" testimony of the respondent's own employee was premised. On this issue, where inherently inconsistent testimony is presented as shown by a prior deposition, it can be said that an issue of disputed fact is present. Dudo v. Schaffer, 91 FRD 128; Vanlandingham v. Ford Motor Co.,

99 FRD 1.

An Affidavit not based on personal knowledge is insufficient to support or defeat a Motion for summary judgment. Moreover, belief, no matter how sincere, is not equivalent to knowledge, and an Affidavit should be found to be insufficient where it is based on something less than personal knowledge. Union Ins. Soc. v. William Gluckin & Co. 353 F2d 946. If a sufficient challenge is presented against a person claimed to have the requisite knowledge of the questions in dispute, the same should result in a denial of the Motion for summary judgment.

In this proceeding, there was presented two differing opinions of individuals claimed to be experts in the field of centrifuges. The petitioner's expert presented proof that the Tolhurst centrifuge extractor had a product design and manufacturing defect.

The respondent's employee presented an Affidavit that no such product design defect occurred, and instead, that the extractor had had certain of its safety features deliberately defeated. The petitioner's expert refuted said opinion. A Motion for summary judgment should be denied where Affidavits present a credibility conflict between expert witnesses presented by the moving and opposing parties to the Motion on relevant issues, or where there is a necessity for expert testimony to translate and interpret technical facts which are material. The weight to be given expert evidence is normally an issue for the trier of the facts. Scharf v. United States Atty. Gen., 597 F2d 1240.

In First Nat. Bank of Ariz. v. Cities Service Co., 391 US 253, 289, this court held on the issue of

determining the propriety of summary judgment that "all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial."

In Agosto v. Immigration & Naturalization Service, 436 US 748, 756-757, this court held that summary judgment should not generally be granted based upon the assessment of the credibility of evidence presented. Where the evidence consists of testimony of live witnesses concerning material factual issues, it will seldom, if ever, be appropriate to deny a de novo hearing, since only when the witnesses are presented and subject to cross examination can their credibility and the weight to be given to their testimony be appraised.

In Poller v. Columbia Broadcasting System, 368 US 464, this court set the standard by which summary judgment should either be granted or denied by the Trial Court. In reversing the granting of summary judgment and remanding the case for trial, it was held that only where the moving party is entitled to judgment as a matter of law, or where it is quite clear what the truth is, and where there exists no genuine issue which remains for trial, should summary judgment be granted. The purpose of the rule is not to cut litigants off from the right to trial by jury if they really have such issues to try. In determining the Motion, the record would be viewed in a light most favorable to the party opposing the Motion. It was held that it could not be said as a matter of law what in fact the truth was. Only when witnesses are present and subject

to cross examination can their credibility and the weight to be given to their testimony appraised. "Trial by Affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'." Because of the facts shown and the law announced by this court, it was held that the Motion for summary judgment had been improperly granted.

In Taylor v. Mississippi, 319 US 583, 585, it was held by this court that where certain evidence was contradictory and conflicting, it was the duty and obligation of the jury to resolve said conflicts. In Lavender v. Kurn, 327 US 645, 652-53, this court held that the courts below had been incorrect in reversing a judgment recovered by the plaintiff, for on VII Amendment grounds, it would be an undue invasion of a jury's historic function for an Appellate Court to weigh the conflicting evidence,

judge the credibility of witnesses and arrive at a conclusion opposite that one properly to be determined by a jury. In Sentilles v. Inter-Caribbean Shipping Corp., 361 US 107, 109-110, it was held by this court that it was a jury function to draw inferences as to causation. In this proceeding, such a right to determine the cause of the accident which so severely injured the petitioner on May 2, 1980, has been withdrawn from jury consideration. In Gallick v. Baltimore and Ohio Railroad Company, 372 US 108, it was held that the issues of negligence and circumstantial evidence were properly to be considered by the jury as a fact finding arm of the court. A jury is required to resolve conflicting inferences, not the court on a Motion for summary judgment. The jury weighs the evidence in conflict, any inferences to be drawn therefrom and judges

the credibility of witnesses, both expert and lay, and then draws the ultimate conclusion as to the facts presented.

It appears from the Decisions of both the Trial and Appellate Courts of the State of New York in this proceeding that a determination was made on the Motion for summary judgment to reject the evidence (in Affidavit form) offered by the petitioner in opposition to the Motion for summary judgment. This action as taken rejected both the testimony of the petitioner as well as his expert witness and then deemed that the Affidavits presented by the respondent were more credible.

In the facts presented to both the Trial and Appellate Courts of the State of New York, there was alleged by the respondent three reasons why it should prevail on its Motion for summary judgment. It was contended that separate safety

devices on the extractor had been deliberately rendered inoperative after it left the control of its predecessor; that the extractor was furnished with protective covers which were absent from the extractor on May 2, 1980; and that it was the absence of the covers or other action taken as to the safety features which caused the happening of the accident rather than a deficiently designed mechanical interlock system. The petitioner, through the opinion of his expert responded to all of these contentions and presented to the courts below that the extractor disclosed a basic design defect in the mechanical interlock system, said defect being in the implementation and manner in which the design was carried through, which enabled the accident and resulting injuries sustained by the plaintiff to occur. Said expert found

that there was a basic design concept to manufacture an interlock system into the machine, but by reason of a design deficiency and poor engineering judgment, an unsatisfactory implementation of a serious safety requirement failed to preclude the happening of the accident. It was further alleged that at the time in which the extractor was manufactured, there did exist proper professional engineering techniques and principles which were available and could have been applied to the extractor to avoid the accident as occurred in this case. It was the opinion of the petitioner's expert witness that an interlock system properly designed could not or should not be able to be defeated so that the equipment or extractor could then be made operational. Further, if safety features are able to be defeated or fail of their own volition,

that there necessarily occurs a failure of safety due to a deficient design.

The petitioner's expert physically inspected, tested and operated the extractor, while the respondent's expert never did in fact test or operate the same. The petitioner's expert found and stated that the covers on the extractor were constructed in a deficient manner in which their casting broke or cracked, thereby allowing them to be a hazard instead of a safety feature. The respondent's expert testified as to two separate extractors, and presented what at best could be classified as a confusion between each of the pieces of equipment where the accident happened. The respondent's expert had the opinion that a mechanical interference rod had been deliberately mispositioned so as to cause or contribute to the happening of the accident through a permitting of

the extractor to become operational when the covers were not in place. The petitioner's expert testified that this was not what had occurred, but that the mechanical interference rod had shifted or moved of its own volition, and that if it had been of a different type or style construction, the accident would not have happened, for the extractor could not have been placed into operation without the covers in place.

With these facts presented to the court, it is submitted that a Motion for summary judgment was improper, for only one of the two expert opinions were able to be accepted. To accept that as submitted by the respondent and reject that as submitted by the petitioner constituted an undue invasion into the fact-finding function and province of a jury.

There was additionally presented to

the courts below issues as to the ability of the respondent's own employee to render an expert opinion based upon what he had testified to at a pre-trial deposition. He testified that he had never seen the extractor in operation, that he had never seen an extractor similar to the type which the petitioner had been injured, that he had never performed any tests or test data on an extractor similar to the type which had injured the petitioner, and that he confused two different extractors which were positioned side-by-side. When he was asked at the pre-trial deposition as to certain expertise involving design deficiency, he stated "I don't have any formal education in regard to centrifuges." When he was asked as to a conclusion whether anything had been tampered with, his attorney objected and directed him not to answer on the grounds

that it would call for something without his knowledge and a conclusion. In view of the serious challenge made to the very basis upon which the respondent relied in offering an expert witness, coupled with that witness being its own employee, acceptance or rejection of his opinion was required to be determined by a jury.

In dismissing the plaintiff's Complaint on summary judgment grounds, the courts of the State of New York never did fully and fairly consider the cause of action sounding in negligence and all of the contentions raised in support thereof. The original Record on Appeal in the courts below will be subpoenaed to this court for its review on the issues presented herein.

The action taken by the courts of the State of New York violated the VII Amendment to the United States Constitution by denying to the petitioner his right to a jury trial

on contested issues of fact. For said reason, the Petition for Writ of Certiorari should be granted to reverse and vacate the Orders made by the New York State Courts which dismissed the petitioner's Complaint.

CONCLUSION

The Petition requesting a Writ of Certiorari should be granted; the Orders and underlying Decisions of the New York State Courts reversed and vacated; and this case remanded to the Trial Court for a trial on all issues.

Dated: April 14, 1986.

Respectfully submitted,

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Decision of Trial Court on
Motion for Summary Judgment

STATE OF NEW YORK
SUPREME COURT MONTGOMERY COUNTY

HAROLD LOVELACE,
Plaintiff,

against

AMETEK, INC.,
Defendant.

AMETEK, INC.,
Defendant and
Third Party Plaintiff,

against

INDUSTRIAL KNITTED FABRICS &
FINISHING CORP.,
Third Party Defendant.

SUPREME COURT: SPECIAL TERM
Fulton County

APPEARANCES:

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Attorneys for Defendant & Third-Party
Plaintiff, Ametek, with DONALD A.
CAMPBELL, ESQ., of Counsel.

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GRAVES, J.

The defendant and third party plaintiff, Ametek, Inc., ("Ametek"),

has moved for an order granting summary judgment pursuant to CPLR 3212, dismissing the complaint of the plaintiff Harold Lovelace ("Lovelace") and all cross-claims of the third party defendant, Industrial Knitted Fabrics & Finishing Corp. ("Industrial").

The two causes of action pleaded in the plaintiff's complaint against the defendant Ametek are based upon theories of strict products liability and negligence. The defendant Ametek impleads the plaintiff's employer, Industrial, alleging that it, as a third party defendant, is liable due to a deliberate modification or defeating of certain safety features.

The defendant and third party plaintiff Ametek is the successor in interest to the manufacturers of the Tohurst

Centrifugal Extractor, and by agreement, assumed its liabilities.

The Extractor in this action at best can be compared to a large top-loading washing machine in the spin cycle, except that it was designed for industrial rather than domestic purposes. The drum, however, unlike a washing machine, is centrally suspended on a shaft from above the drum, said shaft being driven by a belt.

It appears that on May 2, 1980, while plaintiff was an employee of the third party defendant Industrial, he was assigned to the operation of a Tohurst Centrifugal Extractor located in said Industrial's plant. The Extractor consisted of a large, centrally suspended drum inside a casing. Wet fabric is loaded in the drum and then, through certain operational

procedures, rotated, thereby forcing water out of the fabric by centrifugal force. Plaintiff alleges that his injury was caused after he turned the machine on, by fabric leaving the drum of the extractor, which fabric wrapped itself around his arm and dragged him into the drum, causing severe injuries.

On the day in question, the plaintiff placed a load of wet cloth into the drum of the machine, and tied one end of the cloth to the shaft, so that it would be easier to extract from the drum after a substantial amount of water was removed from the fabric. He thereafter placed the extractor into operation by pushing a lever that engaged a belt behind the machine to begin spinning the drum of the extractor. That as the extractor was

gaining momentum, a piece of cloth came out of the drum and began flopping against the frame portion of the machine. The plaintiff then reached for the engaging lever with his left arm as to disengage the machine, thereby allowing the piece of cloth to be reinserted when the spinning drum came to rest. The plaintiff attempted to disengage the machine with his left hand on the lever, when a piece of cloth wrapped around his right arm, dragging his entire body into the extractor.

It is the defendant Ametek's position that the extractor was sold with three safety devices which prevented fabric from leaving the drum and to prevent anyone from getting into the drum when it was turning under power. These safety devices were (1) two hinged covers which covered

the opening of the drum, (2) a mechanical device which would prevent the machine from starting when the covers were opened, and (3) a mechanical device which would prevent the covers from opening once the machine was in operation.

The record establishes that the extractor was manufactured sometime in the early 1920's. The record before the Court does not establish whether Industrial purchased the machine as new or used, or the date of purchase, or what safety devices existed on the machine when it became the owner.

At the time of the accident it is the defendant Ametek's position that the affidavits and EBTs established that all of these safety devices were inoperative and/or deliberately defeated, and that had

the three safety devices been operational, the accident could never have happened. It is the plaintiff's position that the proof on this motion does not establish that the safety features were deliberately circumvented by anyone, or whether they were rendered inoperative through their use or fatigue. The affidavits and EBTs, however, did establish that none of the three safety devices were operative at the time of the plaintiff's accident. The plaintiff, as a new employee, was unaware of any such devices, and it was also established that there were no warning notices or existing rules or regulations concerning the operation of the extractor. The plaintiff also takes the position that for a mechanical interlock system to be considered a safety system, it must be

designed properly, and it must not be able to be defeated; or if it fails, it must render the machine inoperative.

The defendant Ametek primarily relies on the case of Robinson v. Reed-Prentice, 49 NY2d 471 (1980) for the proposition that a manufacturer cannot be held liable for accidents arising from material alterations of its product by a third party rendering a safe product defective. In that case the plaintiff employee was severely injured when he placed his hand through an altered safety gate while the machine was in use. A hole was cut into the safety gate in order to adapt the machine to the employer's production business. The Court of Appeals dismissed plaintiff's complaint after a verdict after trial was obtained by the

plaintiff against the manufacturer. The Court held that a manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product, and it is the proximate cause of the plaintiff's injuries. See also Voss v. Black & Decker Mfg., 59 NY2d 102 (1983), and Schumacher v. Shear Co., 59 NY2d 239 (1983).

At the time of the plaintiff's accident, the machine in question had been altered so that the interlocks were not operable, and the covers had been removed. The plaintiff takes the position that the machine should have been designed

in such a way that the safety devices must not be able to be defeated, or if they are defeated, that the interlock system must be designed in such a way as to render the machine inoperable -- in other words, that the machine must be fail safe.

A manufacturer's duty does not extend to designing a product that is impossible to abuse or one whose safety features may not be circumvented. A manufacturer need not incorporate safety features into its product so as to guarantee that no injury will come to every user, no matter how careless, or even reckless. No product can ever be free from an accident causing harm. Material alterations by a third party which work a substantial change in the condition in which the product was placed into commerce by destroying the

the functional utility of key safety features, however foreseeable those modifications may have been, are not within the ambit of a manufacturer's responsibility. See Robinson v. Reed-Prentice, supra.

In view of the above and the record before the Court, Ametek cannot be held liable for an accident that arose as the result of a substantial alteration of the extractor, which destroyed the functional utility of that product's safety features.

The defendant Ametek's motion is accordingly granted. An Order may be submitted accordingly.

Submit Order.

Dated at Schenectady, New York, this 31st day of January, 1984.

/s/ Guy A. Graves
GUY A. GRAVES
Justice of the
Supreme Court

Order of Trial Court on
Motion for Summary Judgment

STATE OF NEW YORK
SUPREME COURT OF MONTGOMERY COUNTY

HAROLD LOVELACE,

Plaintiff,

against

AMETEK, INC.,

Defendant.

AMETEK, INC.,

Defendant & Third
Party Plaintiff,

against

INDUSTRIAL KNITTED FABRICS
& FINISHING CORP.,

Third Party Defendant.

UPON READING AND FILING the notice of motion for summary judgment herein, made by defendant and third party plaintiff AMETEK, INC., the affidavits and affirmations in support thereof, the opposing affidavits filed on behalf of plaintiff HAROLD LOVELACE, the affirmation of counsel for third party defendant, INDUSTRIAL KNITTED FABRICS AND FINISHING

CORP., and upon examination of the photographs submitted by the parties in aid of the court's consideration of said motion; upon hearing Donald A. Campbell, counsel for said Ametek, Inc. in support of said motion, Robert J. Krzys, counsel for said Harold Lovelace in opposition thereto, and Alvin Sabo, counsel for Industrial Knitted Fabrics and Finishing Corp., in support of said motion;

UPON DUE DELIBERATION herein, and the court having rendered its decision upon said motion in writing on January 31st, 1984; it is

ORDERED, that the said motion of defendant and third party plaintiff, Ametek, Inc., be and hereby is granted,

and the complaint herein is dismissed.

/s/ Guy A Graves
Justice of the
Supreme Court

Signed at Schenectady,
New York on 26 of March, 1984.

Decision of Supreme Court,
Appellate Division-Third Department
on Plaintiff's Appeal

June 6, 1985 48837

HAROLD LOVELACE,
Appellant,

v

AMETEK, INC.,
Defendant and Third-Party
Plaintiff-Respondent-
Appellant;

INDUSTRIAL KNITTED FABRICS
& FINISHING CORPORATION,
Third-Party
Defendant-
Respondent.

YESAWICH, JR., J.

Appeals (1) from an order of the Supreme Court at Special Term (Graves, J.), entered March 29, 1984 in Montgomery County, which granted defendant's motion for summary judgment dismissing the complaint, and (2) from an order of said

court, entered April 25, 1984 in Montgomery County, which granted third-party defendant's cross motion for summary judgment dismissing the third-party complaint.

Defendant is the successor in interest tc Tolhurst Machine Works (Tolhurst). In 1920, Tolhurst manufactured an extractor which operates not unlike a top-loading washing machine in its spin cycle in that wet fabric is loaded into the drum and rotates at high speed, thereby forcing the water out by centrifugal force. The extractor's industrial-size drum is centrally suspended and rotated by a belt-driven shaft. To protect the operator, Tolhurst equipped the machine with three safety devices:

(1) two hinged interlocking covers which completely overlaid the large opening at the top of the drum; (2) a device which prevented the machine from starting when the covers were not closed; and (3) a locking mechanism which foreclosed opening the covers while the drum was spinning.

On May 2, 1980, plaintiff, in the course of his employment with third-party defendant, placed a load of wet fabric in the extractor. As the machine gained momentum, a piece of fabric left the drum, wrapped around plaintiff's arm and dragged him into the drum, causing plaintiff serious injuries.

Plaintiff thereafter commenced the present action against defendant asserting causes of action in strict products liability

and negligence. After impleading plaintiff's employer, defendant moved for summary judgment dismissing the complaint and third-party defendant's cross claims. Third-party defendant then cross-moved for summary judgment dismissing both the complaint and defendant's third-party complaint. Special Term granted summary judgment in favor of defendant and third-party defendant. Plaintiff and defendant appeal; defendant does so only to ensure that if plaintiff's complaint is reinstated, its third-party complaint is also reinstated.

The case of Robinson v. Reed-Prentice Div. of Package Mach. Co. (49 NY2d 471) governs and requires an affirmance. There the court stated:

Decision of Supreme Court
Appellate Division-Third Department
on Plaintiff's Appeal

> We hold that a manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff's injuries (id. at 475).

It is undisputed that on the occasion of plaintiff's injury, none of the three safety devices designed to protect those running the extractor were operative and, further, that but for want of those devices, the accident would not have occurred. Although there is a lack of agreement as to why the safety devices were rendered inoperative, the evidence is clear that someone other than defendant removed the protective covers, rotated the

mechanical interference rod 180 degrees out of position, thereby forestalling workability of the safety feature requiring the covers to be closed before the extractor started, and welded the locking device so it, too, was ineffectual. Moreover, defendant's director for products reliability analysis noted that "[t]o misposition the [mechanical interference] rod was not an easy feat". Even if such tampering and defeat of the extractor's protective devices was foreseeable during the 60-year interval between its manufacture and the accident, the responsibility for injuries therefrom would not fall on defendant. Essentially, the plaintiff's objections to the extractor's design are premised on his expert's

opinion that the manufacturer was duty bound to make the machine fail-safe, a thesis squarely rejected in Robinson v. Reed-Prentice Div. of Package Mach. Co. (supra).

Orders affirmed, without costs.

MAIN, J.P., MIKOLL, YESAWICH, JR., LEVINE and HARVEY, JJ., concur.

Order of Supreme Court
Appellate Division-Third Department
on Plaintiff's Appeal

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 15th day of April, 1985.

PRESENT:

HON. ROBERT G. MAIN,
Justice Presiding,
HON. ANN T. MIKOLL
HON. PAUL J. YESAWICH, JR.
HON. HOWARD A. LEVINE
HON. NORMAN L. HARVEY,
Associate Justices.

NEW YORK SUPREME COURT
Appellate Division - Third Department

HAROLD LOVELACE, Plaintiff-Appellant,

-against-

AMETEK, INC., Defendant-Respondent.

AMETEK, INC., Defendant-Third-Party Plaintiff-Appellant,

-against-

INDUSTRIAL KNITTED FABRICS & FINISHING CORP., Third-Party-Defendant-Respondent

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Order of Supreme Court Appellate Division-Third Department on Plaintiff's Appeal

Harold Lovelace, plaintiff, having appealed from an order of the Supreme Court of Montgomery County, entered on the 29th day of March, 1984, in the office of the clerk of the County of Montgomery, and Ametek, Inc., defendant, having appealed from an order of the Supreme Court of Montgomery County, entered on the 25th day of April, 1984, in the office of the clerk of the County of Montgomery, and said appeals having been presented during the above-stated term of this Court, and having been argued by Robert J. Krzys, Esq., of counsel for appellant, and by Donald A. Campbell, Jay P. Mayesh, Esq., of counsel for respondent-appellant, and, after due deliberation, the Court having rendered a

Order of Supreme Court
Appellate Division-Third Department
on Plaintiff's Appeal

decision on the 6th day of June, 1985, it is hereby

ORDERED that the orders appealed from be and hereby are affirmed, without costs.

ENTER:

/s/ Michael J. Novack
Clerk

DATED AND ENTERED: June 18, 1985.

A true copy

/s/ Michael J. Novack
CLERK

Decision Denying Leave to Appeal

HAROLD LOVELACE,

Appellant,

vs.

AMETEK, INC.,

Respondent.

And a third-party action.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements. Judge Hancock took no part.

Decision Court of Appeals Jan. 14, 1986.